O/A 9-5-89

IN THE SUPREME COURT

STATE OF FLORIDA

BROWARD COUNTY,

Petitioner/Appellant,

v.

KEITH FINLAYSON, et al.,

Respondent/Appellee.

Case No. 73,475

REPLY BRIEF OF PETITIONER/APPELLANT BROWARD COUNTY, FLORIDA

JOHN C. COPELAN, JR.
County Attorney
BROWARD COUNTY, FLORIDA
Governmental Center, Suite 423
115 South Andrews Avenue
Fort Lauderdale, Florida 33301
(305) 357-7600

JAMES C. CROSLAND
GORDON D. ROGERS
MULLER, MINTZ, KORNREICH, CALDWELL,
CASEY, CROSLAND & BRAMNICK, P.A.
Suite 3600
Southeast Financial Center
200 South Biscayne Boulevard
Miami, Florida 33131-2338
(305) 358-5500

Counsel for Petitioner/Appellant
Broward County, Florida

July 25, 1989

TABLE OF CONTENTS

TABLE OF CITATIONS

Other Authorities Cited:

PRELIMINARY STATEMENT

Respondents[1/] herein have attempted to obfuscate the impact of sovereign immunity upon this case by reordering points on appeal and by otherwise drawing attention away from the dubious merits of the judgment entered against the County. Although the clear conflict between the Districts on prejudgment interest is the mechanism which permitted Supreme Court review, this Court is now authorized to right a grievous wrong by ruling that the same governmental immunity which shields the County from liability for interest also deprived the circuit court of subject matter jurisdiction over this alleged "breach of contract" action. Accordingly, the judgment as a whole should be reversed because the circuit court lacked jurisdiction to grant such relief.

REPLY TO RESPONDENTS' STATEMENT OF THE FACTS AND OF THE CASE

Much of the EMTs' Answer Brief is devoted to attempts to disassociate themselves from their labor union, Local 2485, IAFF. The falsity of such disclaimers is conclusively established by the sworn testimony of the EMTs' trial counsel that "all members of the class were union members" [R-1278]. This Court should therefore disregard these misrepresentations and acknowledge that the alleged common law class and Local 2485 were, in fact, identical for purposes of the civil service grievance and the subsequent breach of contract suit. The EMTs were bound by the actions of their union/class representatives in collective bargaining negotiations from the date Local 2485 was certified as their exclusive bargaining agent on May 25, 1979 [R-226].

1/ Respondents herein will be referred to as "the EMTs." The Petitioner will be referred to as "the County." The labor union which was certified as the exclusive collective bargaining agent for the EMTs on May 25, 1979, the Professional Medical Rescue Association of Broward County, Local 2485, IAFF, will be referred to as "Local 2485." References to the Record on Appeal before the Fourth District will be designated as [R-page number].

The EMTs' claim that Local 2485's union organizing and collective bargaining activities are not reflected in the record on appeal [Answer Brief at pp. 40-41] is also false.[2/] It is true that the trial court prohibited the jury from considering the bulk of this evidence based upon the motions in limine and her erroneous conclusion that collective bargaining constituted inadmissible settlement negotiations. The proffers made were adequate to apprise the trial court and this Court of the substance and materiality of the evidence (i.e., that the civil service rule had been consistently interpreted by both parties for years as requiring overtime only after regularly scheduled shifts and that the same arrangement was continued in the collective bargaining agreement). Such evidence was clearly material to the sole issue submitted to the jury and its exclusion constituted reversible error.

The County additionally disputes the EMTs' assertion in argument that the County's proffer of the very limited hours the EMTs actually spent on rescue calls was somehow inadequate [See R-12]. This evidence was material to the question ultimately decided by the jury because the fact that EMTs spent considerable on duty time "housesitting" [R-9-13, 9831 or waiting for calls supported the County's position that their annual salary covered all 56 hours on duty. The trial court rejected such evidence as precluded by the

---

2/ The record reflects that Local 2485 petitioned the Public Employees Relations Commission (PERC) for certification as the exclusive collective bargaining agent for the EMTs on May 24, 1978 [Defendant's Proffered Exhibit No. 3]; that Local 2485 was certified by PERC on May 25, 1979 [R-2261; that in the subsequent collective bargaining negotiations, Local 2485 did not claim retroactive overtime and, instead, agreed that annual salary covered all scheduled shifts with overtime based upon a reduced hourly rate only for work in excess of regularly scheduled shifts [R-412-4131; that Local 2485 entered into a collective bargaining agreement with the County on March 11, 1980, which was retroactive to October 1, 1979 [Defendant's Proffered Exhibit No. 4]; that the instant breach of contract action was commenced on July 16, 1980, by counsel contracted for directly by Local 2485 [R-1045-1046; 1277-1280]; and that Local 2485 President Dominic Lanza executed an affidavit on June 2, 1981, stating that Local 2485 represented the EMTs and was financing the class action litigation and, that Keith Finlayson, Local 2485 Vice President, had been designated by Local 2485 to represent the class and oversee the litigation [R-315].

motions in limine and, accordingly, any further proffer would have been futile [R-13]. Similarly, the County's proffer of evidence concerning its waiver and estoppel defense (i.e., years of acquiescence in the County's interpretation of the overtime rule [R-17]) was clearly adequate? Failure to assert that defense a second time before the same appellate court which had previously rejected it did not constitute abandonment of the right to review in this Court.

Finally, the EMTs have missed the point regarding the County's intent to change their payroll computations in 1978. The record is clear that the proposed change would have resulted in elimination of the fictional (and higher) 40-hour rate in favor of the actual 56-hour rate (i.e., annual salary divided by 2,920 hours per year). EMTs would thereafter have received overtime at time and one half based upon the lower 56-hour hourly rate for all hours in excess of their regularly scheduled shifts [R-1329, Defendant's Exhibit No. 1]. This is precisely the pay arrangement agreed to in collective bargaining by Local 2485 (with a six (6%) percent increase in annual salary) which governed the employment relationship after October 1, 1979. At no time were the EMTs ever entitled to overtime after working only 40 hours.

SUMMARY OF ARGUMENT

The circuit court lacked subject matter jurisdiction over the EMTs' overtime claims for breach of the County's civil service rules because the County had expressly waived its sovereign immunity from such claims only with respect to administrative proceedings before its civil service board. In cases not governed by the Administrative Procedures Act, Ch. 120, Fla. Stat., failure to exhaust administrative remedies is jurisdictional and can be raised at any time. Accordingly, the entire judgment appealed from is void and should be reversed by this Court.

3/ § 90.104(b), Fla. Stat. (1987) (court may predicate error on basis of excluded evidence absent offer of proof where substance of excluded evidence is apparent).

In the alternative, the courts below erred in awarding prejudgment interest against the County on the EMTs' overtime claims because no waiver by the County's sovereign immunity from interest can reasonably be implied from the County's general statutory authority to contract or sue and be sued. No statute or contract allows County employees to maintain direct, de novo actions for alleged breach of the civil service rules in circuit court. The County's waiver of immunity from such employee claims is limited to those asserted within five (5) working days and processed in expedited administrative proceedings before its civil service board. Review in the circuit court is limited to common law certiorari. This limited waiver in no way supports any implication that the County has waived its inherent immunity from prejudgment interest on such claims. Accordingly, the prejudgment interest awarded below should be disallowed,

Finally, the trial court's award of attorney's fees incurred in a prior appeal of this case in which fees were not awarded by the appellate court should be summarily reversed because the trial court lacked jurisdiction to award such fees. The contingency risk enhancement awarded to the EMTs should also be reversed as contrary to Florida law and federal precedents because the underlying attorney's fee agreement was not truly contingent.

ARGUMENT AND CITATION OF AUTHORITY

I

THE TRIAL COURT LACKED SUBJECT MATTER JURISDICTION OVER THE EMTS' BREACH OF CONTRACT SUIT BECAUSE THE COUNTY SPECIFICALLY WAIVED ITS SOVEREIGN IMMUNITY FROM SUCH CLAIMS ONLY IN PROCEEDINGS BEFORE ITS AUTONOMOUS CIVIL SERVICE BOARD. ABSENT EXHAUSTION OF THE ADMINISTRATIVE PROCEEDINGS, COURT REVIEW OF THE ADMINISTRATIVE PROCESS IS UNAVAILABLE.

It is settled law in Florida that lack of subject matter jurisdiction based upon sovereign immunity is not an affirmative defense and can be raised at any time. Moore

v. City of St. Petersburg, 281 So.2d 549 (Fla. 2d DCA), ~~cert. denied,~~ 289 So.2d 730 (Fla. 1973); Department of Highway Safety and Motor Vehicles v. Kropff, 491 So.2d 1252 (Fla. 3d DCA 1986). The EMTs seek to avoid this rule through reliance upon a line of cases decided under the Florida Administrative Procedure Act (APA), Ch. 120, Fla. Stat., which characterize dismissal based upon failure to exhaust administrative remedies as a matter of judicial policy to abstain from exercising jurisdiction rather than a matter of power.[4/] However, it appears clear that the courts which have so held based their rulings upon the APA's specific preservation of the circuit court's declaratory judgment jurisdiction under § 120.73, Fla. Stat. See Gulf Pines Memorial Park, Inc. v. Oaklawn Memorial Park, Inc., 361 So.2d 695, 698 (Fla. 1978). With due respect for the superficial appeal of this argument, it simply has no application to county civil service proceedings not covered by the APA which are reviewable only by common law certiorari.

In the instant case the County has unquestionably waived its sovereign immunity with respect to alleged violations of the ordinances which comprise its "civil service contract" with its employees. However, it has done so only insofar as it has consented to be sued exclusively in administrative proceedings before its autonomous civil service board as provided in that "contract." The circuit courts of this state have jurisdiction to review decisions of civil service boards through common law certiorari. See, e.g., DeGroot v. Sheffield, 95 So.2d 912 (Fla. 1957). This limited waiver of immunity, by its own terms, does not authorize ~~de novo~~ litigation of civil service contract disputes in the circuit courts. ~~Cf.~~ Metropolitan Dade County v. Rudoff, 14 F.L.W. 1443, 1444 (Fla. 3d

---

4/ See Department of General Services v. Willis, 344 So.2d 580, 586 (Fla. 1st DCA 1977); St. Joe Paper Co. v. Florida Department of Natural Resources, 536 So.2d 1119, 1122 (Fla. 1st DCA 1988). Department of Revenue v. Joanos, 364 So.2d 24 (Fla. 1st DCA 1978), ~~cert. denied~~, 372 So.2d 467 (Fla. 1979), is inapposite based upon its specific holding that the APA did not repeal other statutory circuit court jurisdiction over tax cases. Jones v. Braxton, 379 So.2d 115 (Fla. 1st DCA 1979) also misses the mark because it involved injunctive relief to prohibit a school board from breaching a construction contract and not retroactive monetary damages.

DCA June 13, 1989) (public employees bound to contractual method of dispute resolution with no resort to de novo review in circuit court). Unlike the APA, the civil service ordinance does not contain an express provision for circuit court jurisdiction. Thus, in this type of case, exhaustion of administrative remedies is jurisdictional because only in cases where the civil service proceedings have been exhausted is judicial review available and then only via common law certiorari.

Even in non-APA cases where sovereign immunity is not at issue, an attack on the court's authority to entertain an action based upon failure to exhaust administrative remedies is an attack on the court's jurisdiction. For example, in City of Gainesville v. Republic Investment Corp., 480 So.2d 1344, 1347 (Fla. 1st DCA 1985), a non-APA case, the court considered the subject matter jurisdiction of a circuit court in connection with a land developer's action for declaratory relief challenging a preliminary denial of a site plan under a city zoning ordinance. Although the developer had only partially complied with the city's administrative review procedures, a motion to dismiss for failure to exhaust administrative remedies was denied by the trial court. The developer thereafter received a favorable declaration from the circuit court. The city did not raise the exhaustion issue on appeal. Nevertheless, the appellate court held that "the exhaustion of administrative remedies requirement may not be ignored" [id. at 13481 and that the issue could still be reviewed because, as a result of the failure to exhaust administrative remedies, the circuit court 'lacked subject matter jurisdiction" [id. at 1347-1348]. Moreover, even in more recent APA cases, failure to exhaust administrative remedies has been held to be a challenge to the subject matter jurisdiction of a circuit court. See Criterion Insurance Co. v. Department of Insurance, 458 So.2d 22, 25 (Fla. 1st DCA), rev. dismissed, 461 So.2d 114 (Fla. 1984); Department of Business Regulation v. Provende, Inc., 399 So.2d 1038, 1041 (Fla. 3d DCA 1981).

In this case, the EMTs initially appealed the denial of their civil service grievance to the Fourth District Court of Appeal [R-553]. They concurrently commenced the

instant action in circuit court and requested that the appeal be held in abeyance pending a ruling by the circuit court on the County's motion to dismiss for failure to exhaust civil service remedies. Upon denial of the motion, the EMTs dismissed the appeal and proceeded exclusively in circuit court. The EMTs apparently presumed (erroneously) that the County was covered by the APA and that an appeal to the Fourth District was appropriate [see the explanation by counsel for the EMTs at R-1285-12861. The Fourth District had no jurisdiction in the case but could have sua sponte transferred the case to the circuit court for review by certiorari. See Elmore v. City of Orange City, 528 So.2d 997 (Fla. 5th DCA 1988); Ceslow v. Palm Beach County, 428 So.2d 701 (Fla. 4th DCA 1983); Fink v. Metropolitan Dade County, 403 So.2d 1060 (Fla. 3d DCA 1981). The denial of the County's exhaustion challenge to the trial court's jurisdiction was not appealed until it was raised before this Court. However, as in City of Gainesville, the exhaustion requirement in non-APA cases such as this goes to the trial court's subject matter jurisdiction and may properly be reviewed by this Court.

This conclusion is supported by other non-APA cases involving local administrative boards where resort to the courts is limited to review proceedings via certiorari. In City of Miami Springs v. Barad, 448 So.2d 510 (Fla. 3d DCA 1983), a public employee initiated a civil service grievance and thereafter sought declaratory relief in circuit court. There, the court held that the employee was not entitled to de novo proceedings and that his sole remedy was to appeal the civil service board's decision to the circuit court via certiorari. Similarly, in City of Hollywood v. Litteral, 446 So.2d 1152 (Fla. 4th DCA 1984), an employee was denied a hearing by a civil service board and commenced an action for injunction. The appellate court held that the employee's sole remedy after being denied the hearing was an appeal via certiorari. Because the appeal was not filed within thirty days, the circuit court lacked jurisdiction over the action. Accord Hammond v. City of Miami, 396 So.2d 237 (Fla. 3d DCA 1981) (municipal pension board); Hampton v. Miami City Employees Retirement System, 528 So.2d 103 (Fla. 3d DCA 1988)

(municipal pension board). Cf. City of Hollywood v. Fielding, 362 So.2d 362 (Fla. 4th DCA 1978) (appropriate remedy for civil service board's failure to conduct a timely hearing was to order a hearing and not reinstatement and back pay).

In summary, the foregoing precedents establish that upon denial of their civil service grievance, the EMTs should have exhausted the remaining steps of the administrative process and thereafter, if necessary, sought relief in the circuit court by common law certiorari. It remains clear that in non-APA cases like the instant case involving a local administrative board, failure to exhaust such administrative remedies deprives the circuit court of subject matter jurisdiction and precludes subsequent efforts to obtain the same relief through a de novo circuit court proceeding. Accordingly, the judgments below should be reversed and the case should be remanded for dismissal based upon lack of subject matter jurisdiction.

II

THE LOWER COURTS CLEARLY ERRED IN AWARDING PREJUDGMENT INTEREST AGAINST THE COUNTY ON THE BACK PAY CLAIM BECAUSE THE COUNTY HAS NOT EXPRESSLY OR IMPLIEDLY WAIVED ITS SOVEREIGN IMMUNITY FROM PREJUDGMENT INTEREST IN DE NOVO BREACH OF CONTRACT SUITS FOR ALLEGED VIOLATIONS OF ITS CIVIL SERVICE RULES.

The EMTs argue that sovereign immunity has been judicially abrogated with respect to essentially all prejudgment interest claims against counties and other state entities. They urge this Court to recede from the requirement of particularized waivers established in Board of Public Instruction of Okaloosa County v. Kennedy, 109 Fla. 153, 147 So. 250 (1933) and Treadway v. Terrell, 117 Fla. 838, 158 So. 512, 518 (1935), in favor of a rule which would allow wholesale waivers of immunity from interest in all cases in which a state entity possesses only the most general authority to contract or sue or be sued. Respectfully, the County submits that this Court should reject the EMTs' argument and instead retain this last remaining vestige of sovereign immunity by permitting such

interest awards only where specifically authorized by statute, an express contract agreeing to pay interest, or a reasonable implication of statutory intent to allow interest.

In United States v. Louisiana, 446 U.S. 253, 100 S.Ct. 1618, 1626, 64 L.Ed.2d 196, reh'g denied, 447 U.S. 930, 100 S.Ct. 3007, 65 L.Ed.2d 1110 (1980), a state attempted to assert a claim for 88 million dollars in interest against the United States for alleged breach of an agreement concerning oil lease payments.?' In rejecting the claim, the Supreme Court reaffirmed the traditional immunity of the sovereign from the payment of interest, stating:

> Apart from constitutional requirements, in the absence of specific provision by contract or statute or "express consent ... by Congress," interest does not run on a claim against the United States [emphasis supplied, citations omitted]. Id. at 265-266, 100 S. Ct. at 1626.

Thus, contrary to the EMTs' efforts to distinguish this Court's decision in Okaloosa County, supra, the foregoing precedent makes it clear that in order to hold a state entity liable for interest on a contract claim, the underlying contract itself or a statute must contain a specific provision allowing interest. The "civil service contract" at issue in the instant case contained no such specific provision; nor was payment of interest on civil service back pay claims expressly consented to by the Broward County Commission. The only waiver expressly or impliedly attributable to the County was consent to have those civil service contract claims which were asserted within five (5) working days resolved by its civil service board with limited review in the circuit courts by certiorari.

In Berek v. Metropolitan Dade County, 422 So.2d 838 (Fla. 1982), this Court construed specific provisions contained in § 768.28(5), Fla. Stat. (1979), which made the

---

5/ Applying the equities analysis, the Supreme Court noted in denying the claim for interest that the state had acquiesced in the arrangement for two (2) decades in spite of its knowledge that the United States considered itself not liable for interest.

state "liable for tort claims in the same manner and to the same extent as a private individual" but prohibited awards of punitive damages and prejudgment interest. The Court held that the specific reference prohibiting prejudgment interest justified an implied waiver with respect to awards of post judgment interest and costs. However, this Court then reaffirmed the general rule that all waivers of sovereign immunity "must be strictly construed" and held that post judgment interest and costs could be awarded only to the extent that the overall award did not exceed the $50,000.00 statutory maximum. Id. at 840.

In the instant case, there is no express statute which renders the County liable for employee back pay claims in the same manner as a "private individual." Cf. Florida Livestock Board v. Gladden, 86 So.2d 812, 813 (Fla. 1956) (awarding post judgment interest only where the particular statute at issue gave the state board "all other rights and immunities otherwise enjoyed by bodies corporate"). Likewise, unlike Treadway, there is no statute authorizing direct employee suits against the County for specific work performed. Instead, the civil service rules and Florida common law prohibit ~~de novo~~ employee suits for alleged violations of those rules in favor of an expedited and exclusive administrative dispute resolution process before an autonomous civil service board. Access to the courts is limited to certiorari review proceedings. In view of these express limitations contained in the controlling "civil service employment contract," there is no lawful basis upon which waiver of immunity from interest could reasonably be implied.

In summary, the County urges this Court to adhere to its holdings in Okaloosa County, Treadway and Flack v. Graham, 461 So.2d 82 (Fla. 1984), by ruling that prejudgment interest is not available in a contract action against a state entity unless the contract sued upon contains an express agreement to pay interest or a specific

statute authorizing such suits reasonably justifies an implied waiver of sovereign immunity.-6/

Nor should this Court be fooled by the EMTs' "distressing" argument regarding the equities of this case. The instant overtime claim has been a fraud since its inception. Although they may have complained briefly in 1975, at no time prior to the 1980 civil service grievance did the EMTs assert or even mention a formal claim of overtime entitlement despite the fact that the civil service process had always been available to enforce such claim. Unlike the disgruntled judicial candidate in Flack, the EMTs did not diligently pursue their claims immediately upon becoming aware that overtime was not forthcoming. Instead, they sat idly by and received paycheck after paycheck for a period of years during which overtime was paid only for hours in excess of regularly scheduled shifts. Their class representatives, through Local 2485, participated in months of collective bargaining negotiations without even mentioning any alleged right to overtime at the fictional 40 hour rate for all hours in excess of 40.

The EMTs did not respond in any manner to formal written confirmation from their Division Director on November 5, 1979, that overtime would be paid only for hours in excess of regularly scheduled shifts [Defendant's Exhibit No. 11 at R-13291. When Local 2485 did agree to a collective bargaining agreement, the fictional 40 hour rate was reduced in the contract to reflect the actual 56 hours on duty which had always been

---

6/ See Cauley v. City of Jacksonville, 403 So.2d 379 (Fla. 1981) (Florida counties historically had sovereign immunity but municipalities did not); Brownell v. City of St. Petersburg, 128 F.2d 721 (5th Cir. 1942) (counties not liable for interest on contracts but municipalities are liable under Florida law). Similarly, this Court's opinion in Pan-Am Tobacco Corp. v. Department of Corrections, 471 So.2d 4 (Fla. 1984), authorized breach of contract suits against state entities (presumably where other dispute resolution procedures are not contained in the underlying contract) but did not specify the elements of damages for which the state could be held liable in such suits. Adherence by this Court to a rule requiring strict construction of any waiver of other elements of sovereign immunity (i.e., permitting judicial enforcement without prejudgment interest except when specified in the contract) would be wholly consistent with the above precedents.

covered by annual salary. The practice of paying overtime only for hours in excess of regularly scheduled shifts, albeit at the lower, 56-hour rate, was continued. It was not until approximately three (3) months after the contract was signed (eight and one half months after its effective date) that the EMTs first asserted a formal (albeit fictional) claim for approximately seven (7) years of unbudgeted retroactive overtime. As the EMTs state, the equities could not be clearer, but they all fall on the side of the taxpayers of Broward County.

Finally, it is submitted that this Court should ask under Flack --- what more could the County have done to speed the resolution of this dubious overtime claim. Unlike the employer in Perry v. City of Fort Lauderdale, 387 So.2d 518 (Fla. 4th DCA 1980) (Perry II), the County did not sit idly by and allow additional overtime arrearages to accrue after the civil service grievance and the subsequent breach of contract suit put it on notice of the disputed claim. Instead, the EMTs herein sought only retroactive monetary damages because overtime entitlement had already been addressed for the future in the collective bargaining agreement. Thus, at the point the EMTs first asserted their back overtime claim, there was nothing the County could have done except acquiesce in the fraud or defend its position in the courts. Accordingly, in contrast to Perry II, the equities in this case are with the taxpayers of Broward County and the award of prejudgment interest should therefore be reversed.

III

THE TRIAL COURT EXCEEDED ITS JURISDICTION BY AWARDING THE EMTS ATTORNEY'S FEES FOR A PRIOR APPEAL AND FURTHER ERRED BY GRANTING A CONTINGENCY RISK ENHANCEMENT BECAUSE THE UNDERLYING FEE ARRANGEMENT WAS NOT TRULY CONTINGENT.

As their final points, the EMTs assert that the County did not object to the trial court's jurisdiction to award fees for the prior appeal. The EMTs additionally argue that

the non-contingent nature of their attorney's fee agreement was not specifically argued to the trial court as a reason for denying a contingency risk enhancement under Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985).7/ In this regard, the County concedes that the specific argument does not appear in the record in exactly the terms subsequently adopted in Head v. Lane, 541 So.2d 672 (Fla. 4th DCA 1989). However, the essential elements of that argument (i.e., avoidance of the undeserved windfall of enhanced fees under Rowe where an attorney gets paid win or lose) appear throughout the transcript of the hearing on the attorney's fees motion [see, e.g., R-1306, 1311-13131. The EMTs specifically argued that application of a contingency risk enhancement was mandatory under Rowe [R-1317]. The County argued that the trial court should deny enhancement based, at least in part, upon the fact that the EMTs' counsel took "their gamble" but would receive $10,000.00 whether they won or lost [R-13121.

In Rowe, this Court identified the type of cases in which contingency risk enhancements should be applied as follows:

> Because the attorney working under a contingent fee contract receives no compensation when his client does not prevail, he must charge a client more than the attorney who is guaranteed remuneration for his services. When the prevailing party's counsel is employed on a contingent fee basis, the trial court must consider a contingency risk factor when awarding a statutorily-directed reasonable attorney fee [id at 1151, emphasis supplied].

The trial court was aware of the Rowe criteria but nonetheless ruled that the attorney's fee arrangement at issue herein was a contingency fee agreement subject to

---

7/ Ironically, the EMTs appear to have understood both arguments at all times prior to the appeal because no similar objections were raised before the Fourth District. It is clear that the trial court had no jurisdiction to award fees for the prior appeal where fees were not awarded by the appellate court. See Travelers Indemnity Co. of America v. Morris, 390 So.2d 464, 465 (Fla. 3d DCA 1980).

enhancement for the risk of losing the case. Contrary to the EMTs' arguments, this ruling was not within the discretion of the trial court --- it was wrong on the law under Rowe. It is, in any event, well settled that an appellate court must apply the law in existence at the time an appeal is decided even if the issue was not raised before the trial court. Hendeles v. Sanford Auto Auction, Inc., 364 So.2d 467 (Fla. 1978); Lowe v. Price, 437 So.2d 142 (Fla. 1983); Florida East Coast Railway v. Rouse, 194 So.2d 260 (Fla. 1967).

Finally, the County acknowledges the present conflict between Head and decisions of the Third District[8/] allowing risk enhancements in partial contingent fee cases. In view of the clear language of Rowe requiring that, to qualify for risk enhancement, an attorney receive nothing if the case is lost, the Third District cases were obviously wrongly decided. Because Rowe adopted the federal "lodestar" approach, this Court should rely upon federal precedents denying risk enhancements in cases involving partial contingent fees. Welch v. University of Texas, 659 F.2d 531, 535 n.6 (5th Cir. 1981) (fee was not contingent and no enhancement was appropriate where attorney received $25.00 per month from his client); Murray v. Weinberger, 741 F.2d 1423, 1431 (Fed. Cir. 1984) (fee was not contingent where client had agreed to pay one quarter of counsel fees regardless of the outcome of the case). Based upon Rowe and the foregoing federal decisions, the contingency risk enhancement awarded herein should be reversed.

8/ Chrysler Corp. v. Weinstein, 522 So.2d 894 (Fla. 3d DCA 1988); First State Insurance Co. v. General Electric Credit Auto Lease, Inc., 518 So.2d 927 (Fla. 3d DCA 1987).

CONCLUSION

Based upon the foregoing arguments and authorities, the County submits that the instant case should be reversed and remanded with instructions for dismissal based upon lack of subject matter jurisdiction. In the alternative, the judgments entered below should be reversed and the case should be remanded to the circuit court for appropriate proceedings limited to review by certiorari. Finally, in the event that this Court determines that the circuit court had jurisdiction over the EMTs' breach of contract action, the judgments below should be reversed and the case should be remanded for a new trial on all issues, including entitlement to overtime. The trial court should be specifically instructed to allow all relevant evidence to be considered by the jury and should be prohibited from awarding prejudgment interest, attorney's fees for the prior appeal or a contingency risk enhancement of attorney's fees against the County.

MULLER, MINTZ, KORNREICH, CALDWELL,
CASEY, CROSLAND & BRAMNICK, P.A.

Suite 3600
Southeast Financial Center
200 South Biscayne Boulevard
Miami, Florida 33131-2338
(305) 358-5500 (Dade)
(305) 522-0393 (Broward)

By James C. Crosland
James C. Crosland

By
Gordon D. Rogers

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief of Petitioner/Appellant has been furnished to Paul R. Regensdorf, Esquire, and Stuart Rosenfeldt, Esquire, Fleming, O'Bryan & Fleming, P.O. Drawer 7028, Fort Lauderdale, Florida 33338, by depositing same in the United States mail, first class postage affixed thereto, this 25th day of July, 1989.

Gordon D. Rogers

BRE-092/rr